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DATE: March 15, 2000

Chuck Figur, EPA

Region VIII

Denver, CO.

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Message:

PLEASE SEE THE ATTACHED LETTERS FROM THE MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY.

JOHN T. SMITH II

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Montana Department of
ENVIRONMENTAL QUALITY

Marc Racicot, Governor

P.O. Box 200901 - Helena, MT 59620-0901 • (406) 444-2544 • E-mail: www.deq.state.mt.us

March 10, 2000

CERTIFIED MAIL # P478531486
Return Receipt Requested

J. R. SHAW
MAR 13, 2000

John Shaw, Plant Manager
ASARCO East Helena
P.O. Box 1230
East Helena, MT 59635

RE: Violations of the Montana Hazardous Waste Act at ASARCO East Helena (FID#260)

Dear Mr. Shaw:

The Department of Environmental Quality is prepared to initiate a judicial enforcement action against ASARCO East Helena for violations of the Montana Hazardous Waste Act (MHWa). The violations involve the storage of tank bottoms in three-sided concrete bins. The three-sided concrete bins are not acceptable storage units for hazardous waste. Laboratory analysis of tank bottom samples collected by the Department revealed the wastes contained lead, cadmium, and other metals in excess of TCLP regulatory limits. These characteristics coupled with ASARCO's mishandling of the wastes (see M. Steger Smith's March 7, 2000 letter to Jon Nickel) indicate that ASARCO stored and treated hazardous waste in an unauthorized manner in violation of the MHWa.

Information collected during inspections in November 1998 and May 1999, as well as information ASARCO produced in response to EPA's RCRA 3007 request, indicate that ASARCO stored the hazardous waste in the three-sided concrete bins for a substantial period of time. There are six three-sided concrete bins at ASARCO East Helena which are identified as the "97 and 98" bins. During the November 1998 inspection, three of these bins were observed to contain the above-referenced hazardous waste. This material was later consolidated into a single three-sided concrete bin, and Department inspectors observed this bin in May of 1999. ASARCO's documentation confirms that the hazardous waste was present in the 97 and 98 bins from November 5, 1998, through May 27, 1999, for a period of at least 203 days.

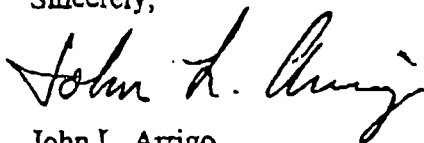
Under Section 75-10-417, MCA, violations of the Montana Hazardous Waste Act are subject to a maximum civil penalty of \$10,000 per day. The Enforcement Division has calculated a settlement penalty of \$188,000 for these violations. For your information, the Department's MHWa penalty policy establishes a 180-day ceiling for multi-day violations and this penalty does not consider all of the days the wastes were stored illegally. A copy of the penalty calculation worksheet is enclosed for your information.

John Shaw
March 10, 2000
Page 2

If you believe that the facts stated above are not accurate, please contact me. The Department will consider any information you provide which indicates that the violations did not occur or that the violations occurred differently than described above. Please be advised that this letter and the proposed penalty are offered for settlement purposes only and are not admissible under Montana Rule of Evidence 408. The Department will agree to resolve this matter with a consent decree if within 15 days of the date of this letter, you inform me of your intent to pay the penalty. If settlement cannot be achieved within a reasonable time, the Department will file a complaint in district court and seek the maximum allowable penalty.

Department staff also documented a similar violation during an October 1999 inspection. It may be appropriate to include this additional violation in any settlement discussions. If you would like to discuss this matter further, please call me, the case manager Kari Smith at 444-1453, or the Department's attorney Mark Steger Smith at 444-1425.

Sincerely,



John L. Arrigo
Administrator
Enforcement Division
(406) 444-5327; fax (406) 444-1923
e-mail: jarrigo@state.mt.us

Enclosure

cc: M. Steger Smith, Legal
Don Vidrine, Air and Waste Management Bureau Chief
John Wardell, EPA Region VIII Montana Office
ENFD File #260



ENFORCEMENT DIVISION PENALTY WORKSHEET

FID #: 260

Responsible Party: Asarco, Inc.

Date: March 10, 2000

VIOLATION #1

- ❖ Failed to place hazardous waste in containers, tanks, or containment buildings...as required by ARM 17.54.421(4)(a)

Asarco, Inc. is a primary lead smelting plant, which functions as a custom smelter for a variety of materials and is registered as a large quantity generator. DEQ conducted a compliance evaluation inspection on November 4 and 5, 1998. On November 5, 1998 the DEQ inspector observed concrete bins, identified as #98, #97A, and #97B, used to store and de-water approximately 100 tons of tank bottom sludge. DEQ inspectors collected three samples of tank bottom sludge as required by ARM 17.54.351(1)(a). The sludge samples were analyzed using EPA Method 1311 Toxic Characteristic Leaching Procedure (TCLP) in accordance with ARM 17.54.351(1)(b). The tank bottom sludge sample contained 124 parts per million (ppm) cadmium and 570 ppm lead. The tank bottom sludge meets hazardous waste listing criteria set forth in ARM 17.54.316(1). The tank bottom sludge exhibited the characteristic of toxicity for cadmium and lead. The EPA hazardous waste number specified in ARM 17.54.324(2), Table I, lists cadmium as hazardous waste number D006 and lead as hazardous waste number D008.

On May 27, 1999 DEQ conducted another compliance inspection and observed approximately 75 tons of tank bottom sludge in the concrete bin identified as #97C. Asarco submitted documentation that indicates Asarco stored hazardous waste in the three-sided concrete bins from November 5, 1998 to May 27, 1999. Asarco failed to comply with the requirements for accumulation of hazardous waste. Asarco placed hazardous waste in concrete bins, which do not meet the specifications for containers at 40 CFR Subpart I or tanks at 40 CFR Subpart J [incorporated by reference in ARM 17.54.421(4)(d) and (4)(e)]. The dewatering conducted in the 3 sided bins also constitutes treatment, as defined in ARM 17.54.201 (138), without a permit in violation of Section 75-10-406 and ARM 17.54.105. For the purposes of penalty calculations the Department will collapse the separate storage and treatment violations into one violation.

Penalty Calculation

1. Gravity of the Violation

a. Potential for Harm: Major

Asarco is an established facility and aware of the Montana Hazardous Waste Act requirements for accumulating and storing hazardous waste. Hazardous wastes D006 and D008 were stored in structures that do not prevent releases of hazardous waste. Asarco failed to properly manage and/or store hazardous waste, increasing the potential of hazardous waste being released into the environment. The release of hazardous waste poses a significant hazard to human health and the environment. The potential for harm is based on the threat to the environment, the risk to Asarco staff, and the overall toxic nature of cadmium and lead. Asarco is cognizant of

Asarco, Inc.
Penalty Worksheet
Page 2 of 3

its responsibility to prevent a release of hazardous waste into the environment. Asarco's action significantly abridged the Department's ability to regulate the proper management of hazardous waste. The overall potential for harm is therefore major.

b. Extent of Deviation: Major

Asarco, as a large quantity generator of hazardous waste, is aware of its responsibility to properly manage hazardous waste. Asarco significantly deviated from specific requirements of storing hazardous waste in appropriate containers, a tank system or containment building which would prevent a release of hazardous waste. These accumulation requirements are essential for a clean and healthy environment. The overall extent of deviation is therefore major.

Gravity-based penalty from matrix\$9,000.00

Because the potential for harm and extent of deviation are major, the appropriate gravity based penalty range is \$8,000 to \$10,000 and is selected from the Montana Hazardous Waste penalty policy matrix (see p. 3). Asarco maintained custody of the tank bottoms, but failed to properly manage the tank bottoms until July of 1999. The mid-range penalty amount is appropriate considering Asarco is a large quantity generator, their regulatory sophistication and the seriousness of the violation. Asarco was notified in writing of accumulation violations following compliance inspections conducted November 4 and 5, 1998 and during the compliance inspection on May 27, 1999. Asarco exhibited a disregard for hazardous waste accumulation/storage requirements and an unwillingness to properly containerize the tank bottoms or dispose of the tank bottoms.

2. Multi-day matrix cell (\$1,000.00)

Montana's Hazardous Waste penalty policy requires the assessment of multi-day penalties of major/major violations. The multi-day penalty amount ranges from \$1,000 to \$5,000 and is selected from the Montana Hazardous Waste multi-day penalty matrix (see p. 3). The multi-day penalty amount of \$1,000 selected is appropriate considering the hazardous waste remained on property with controlled access and Asarco continued to consolidate and reduce the concrete bin usage.

3. Multi-Day Penalty\$179,000.00

Asarco was informed of the violations at the time of the November 1998 DEQ inspection and in a letter dated December 29, 1998. Asarco began consolidating the hazardous waste tank bottoms in January of 1999, yet continued to store the hazardous waste tank bottoms in the three-sided concrete bins until June of 1999. Hazardous waste tank bottoms were stored in the three-sided concrete bins in excess of 207 days. DEQ will implement the penalty policy's mandatory 180 days for the continued hazardous waste accumulation/storage violation. The multi-day penalty amount reflects the number of days the violation continued beyond the date of discovery for a total of 179 days at the fixed amount selected from the multi-day matrix.

4. Calculated Economic Benefit\$0

It is DEQ's policy to assess penalties that negate any economic benefit gained by noncompliance. Upon review of the violations, the economic benefit of noncompliance for this enforcement action is not significant. Asarco's proper management of the tank bottoms would have involved transporting the tank bottoms within the facility to an appropriate containment structure located on site. The transportation cost associated with the transfer of the tank bottoms within the facility would not have produced substantial cost.

DEQ will reconsider assessing economic benefit for this violation if information is received that indicates the monetary benefit realized by Asarco exceeds \$2,500. The penalty, as proposed, is sufficient to recover any economic benefit realized by Asarco.

Asarco, Inc.
Penalty Worksheet
Page 3 of 3

5. Add lines 1, 3 and 4 for penalty amount\$188,000.00

MONTANA HAZARDOUS WASTE PENALTY POLICY MATRIX

MATRIX - Extent of deviation from Requirement				
Potential for harm		MAJOR	MODERATE	MINOR
	MAJOR	\$10,000	\$7,999	\$5,999
		\$8,000	\$6,000	\$4,500
	MODERATE	\$4,499	\$3,499	\$2,599
		\$3,500	\$2,600	\$1,800
	MINOR	\$1,799	\$1,099	\$499
		\$1,100	\$500	\$100

MONTANA HAZARDOUS WASTE MULTI-DAY PENALTY POLICY MATRIX

MATRIX - Extent of deviation from Requirement				
Potential for harm		MAJOR	MODERATE	MINOR
	MAJOR	\$5,000	\$4,000	\$3,000
		\$1,000	\$750	\$550
	MODERATE	\$2,200	\$1,600	\$1,000
		\$400	\$250	\$150
	MINOR	\$600	\$300	\$100
		\$100	\$100	\$0

SUMMARY OF PENALTY CALCULATIONS

VIOLATION #1\$9,000.00

❖ Failed to place hazardous waste in containers, tanks, or containment buildings...as required by ARM
17.54.421(4)(a)

Multi-Day Penalty (179 days x \$1,000)\$179,000.00

Economic Benefit recovered through penalty assessment.....\$0

TOTAL PENALTY ASSESSED\$188,000.00

Kari Smith
Prepared by Kari S. Smith

March 10, 2000
Date



Montana Department of
ENVIRONMENTAL QUALITY

Marc Racicot, Governor

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LEGAL UNIT

Direct Line: (406) 444-4961

Telefax Line: (406) 444-4386

March 7, 2000

Mr. Jon Nickel
ASARCO East Helena
P.O. Box 1230
East Helena, Montana 59635

RWD 2/10/2000

COPY TO: JOHN STAN
RICH MARCUS
J.T. SMITH
CATHY LAYHNER

RE: Violations of the Montana Hazardous Waste Act at ASARCO East Helena.

Dear Mr. Nickel:

The Department of Environmental Quality has asked me to contact you regarding violations of the Montana Hazardous Waste Act at ASARCO East Helena. The violations at issue involve secondary materials in 3-sided concrete bins walled off with lime rock berms.

Department inspectors first noted the presence of secondary materials in the "97 and 98 bins" in November, 1998. You recently received a letter dated January 13, 2000, from William Potts, of the department's Air and Waste Management Bureau. In this letter, Mr. Potts identifies another 3-sided concrete bin that contained additional secondary materials. This bin was discovered in the course of an October, 1999 inspection. Mr. Potts advised ASARCO that it had 30 days from its receipt of his January 13 letter in which to provide documentation of compliance with applicable hazardous waste regulations.

In response to this demand, you sent a letter to Mr. Potts on February 10, 2000, wherein you advance several arguments that the material within the 3-sided concrete bins is not solid waste. However, I understand your letter to essentially present one genuine issue: i.e., Whether the regulations define as "waste" those materials which are destined for ultimate reclamation.¹

Your paragraph "1" properly references ARM 17.54.302(3)(c), as the rule that defines when materials are wastes. However, your analysis of "ARM 17.54.307(1)(r) [sic]" is flawed. First, the department does not rely upon ARM 17.54.307(1)(s) in concluding that the secondary materials at issue here are wastes. Second, subsection (1)(s) is inapposite to this situation because subsection (1)(s) refers to materials stored in tanks, containers or buildings meeting certain integrity standards. As set forth below, the three-sided bins at issue here meet none of the

¹ Your letter does not address, and there does not appear to be, any meaningful distinction between the 97 and 98 bins and the bin discovered in October of 1999. Therefore, when this letter refers to "3-sided bins," it refers to both cases.

Mr. Jon Nickel - Page 2
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requirements of ARM 17.54.307(1)(s). If your position is that the 3-sided bins were pads within the meaning of ARM 17.54.307(1)(s)(iv), your analysis is still problematical because (a) ASARCO never sought a site specific determination to use such pads, (b) ASARCO could not have sought such a determination because LDR Phase IV had not yet been propounded or adopted by the state of Montana, and (c) the material at issue was not eligible for the exclusion because it contained free liquid.

You next note (paragraph "2") that the State cannot vary its interpretation or enforcement of 40 CFR 261.2(c)(3) [ARM 17.54.302(3)(c)] from that of the U.S. EPA. Whether or not that is true in every instance, it is irrelevant here because the department's interpretation of 40 CFR 261.2(c)(3) mirrors that of U.S. EPA with regard to the contents of the 3-sided concrete bins. You have erroneously created a distinction between the State and Federal interpretations of 40 CFR 261.2(c)(3) because you have misinterpreted guidance letters from EPA in your analysis of the regulations governing the secondary materials in the 3-sided bins (see analysis of paragraph "6," below).

In paragraph "3" you state that the wet sweeps and tank bottoms would be characterized as "sludge" and "by-products," respectively. This distinction is actually irrelevant, as you claim in paragraph "4" that both types of material could properly be smelted for metals recovery. The operative inquiry is actually whether this material could be said to be *reclaimed* within the process flow at ASARCO. The department does not necessarily agree with your conclusions here, but for purposes of argument we will assume the secondary materials in the 3-sided bins were indeed destined for reclamation. This assumption would obviate further analysis of paragraphs "3"- "5," and bring us to the salient points of paragraph "6."

In paragraph "6" you cite two letters from EPA as authority for the proposition that "a solid waste destined for reclamation at some point in the future is not a solid waste when first generated, during storage prior to reclamation, during treatment prior to reclamation, and during the reclamation process itself." First, your interpretation of the May 6, 1993 letter from Sylvia K. Lowrance is overly broad. This letter presupposes storage of materials destined for reclamation in a manner that is protective of the environment. In such circumstances, brief storage prior to reclamation would indeed be permissible. However, such is not the case here.

We can ascertain that the Lowrance letter presupposes storage in a manner that is protective of the environment because of three factors. First, you will note that the Lowrance letter is silent as to storage of secondary materials destined for reclamation *on the land* or in any other manner that might contribute to the waste disposal problem.

Second, as is noted in the first paragraph of the second page of the Lowrance letter, respondents in enforcement actions who claim exemption through of recycling "must be able to document a claim of legitimate recycling." The department is skeptical that ASARCO will be able to make such a showing where a significant portion of the material claimed to be "recycled" is lost to

Mr. Jon Nickel - Page 3
March 7, 2000

leakage because of storage in inadequate vessels.

Third, the Lowrance letter antedates the 1990 issuance of the American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) opinion. This case directly addressed the issue of what constitutes "solid waste" in the context of mineral processing secondary materials destined for reclamation. The American Mining (AMC II) court stated the case as follows:

"Petitioners' basic claim is that sludges from wastewater that are stored in surface impoundments and that may at some time in the future be reclaimed are not 'discarded.' The agency, however, exercising its expert judgement, has concluded that, because these sludges are the product of wastewater and are stored in impoundments that threaten harm to the health and environs of those living nearby, these materials are 'discarded.'" Id. at 1186.

Thus, AMC II is not unlike the facts of our situation. We are concerned with secondary materials (be they by-products or sludges) arising from a wastewater treatment system.² You contend these materials are not "waste" because they are destined for reclamation. The department believes the materials are waste because, by their nature and by virtue of ASARCO's management in inadequate containment vessels, the materials "threaten harm to the health and environs of those living nearby..."

When presented with these facts in AMC II, the court held as follows:

"Petitioners read [the 1987 case of] AMC [American Mining Congress v. EPA, 824 F.2d 1177 (AMC)] too broadly. AMC's holding concerned only materials that are 'destined for immediate reuse in another phase of the industry's ongoing production process'... [citation omitted] and that 'have not yet become part of the waste disposal problem.'"

Thus, the simple fact that a material is destined for reclamation does not mean the generator can imperil health or the environment with such material. Materials destined for reclamation must be handled according to the standards articulated in AMC II in order to preserve their exemption from categorization as waste. When Ms. Lowrance sent her letter in May, 1993, she was mindful of the 1990 AMC II decision and intended her guidance to refer to secondary materials destined for immediate reuse which were not part of the waste disposal problem. In short, Ms. Lowrance

² According to ASARCO's own representations (see your October 28, 1992 letter to Mr. D. Scott Brown), the million gallon tanks at ASARCO serve to replace the now defunct Lower Lake:

"Beginning in 1975, Lower Lake was used to settle solids from the Asarco plant process water circuit. Essentially all of Asarco's process water was drawn from Lower Lake and was used for process cooling, building and area washdown, dust suppression and plant fire protection. Water from the process cooling, building and area washdown, and stormwater runoff was then returned to Lower Lake for the settling and collection of solids. Lower Lake was replaced in 1990 by two one-million gallon tanks. These tanks now serve the identical purpose as Lower Lake..."

Clearly, the million gallon tanks serve as a wastewater control mechanism.

Mr. Jon Nickel - Page 4

March 7, 2000

could not have intended her guidance to apply to ASARCO in this case. ASARCO's storage did not involve immediate reuse (ASARCO's own records reveal that ASARCO stored the secondary materials in the 3-sided bins for more than six months) and the secondary materials ASARCO stored in the 3-sided concrete bins did become part of the waste disposal problem (inspectors from DEQ and EPA saw liquid seeping from the toe of the limerock berms³).

You next cite a July 15, 1998 letter from the office of Elizabeth Cotsworth as authority for the proposition that secondary materials destined for reclamation can be stored on the land. Your interpretation of this letter is, again, overly broad. The letter addresses itself to a characteristic by-product at the point of reclamation. Hence these statements in the second paragraph: "The exclusion, found in 40 CFR 261.2(c)(3), states that a characteristic by-product...which is recycled by reclamation is not a solid waste. Therefore, under the Federal regulations, a characteristic by-product being reclaimed would not be subject to RCRA hazardous waste regulations..." (emphasis added). In other words, this letter does not constitute competent authority for ASARCO's claim that "when" as used in 40 CFR 261.2(c)(3), encompasses the time from generation to reclamation.

More importantly, Ms. Cotsworth does not state, in her letter, that the "Table 1" exclusion of 40 CFR 261.2(c) allows materials destined for reclamation to be stored on the land. She states that the land application prohibition of 40 CFR 261.2(e)(1)(ii) (the "closed loop" exclusion) does not apply to the "Table 1" exclusion of 40 CFR 261.2(c). In other words, the "closed loop" (materials returned, in process, without reclamation or land disposal, as a substitute for feedstock materials) land disposal prohibition applies to "closed loop" operations, and not to other types of recycling operations. But that does not mean generators in other types of recycling operations are free to store hazardous materials on the ground pending reclamation. The night time speed limit for trucks in Montana does not apply to cars, but that does not mean cars can travel 100 m.p.h. In short, the Cotsworth letter does not authorize storage on the ground, and does not otherwise impede classification of the secondary material in the 3-sided bins as waste.

In conclusion, assuming it is destined for reclamation, the secondary material in the 3-sided concrete bins would ordinarily not be considered a solid waste. It would be exempt under the "Table 1" exclusion. However, ASARCO lost the right to claim that exemption when it mismanaged the secondary materials in a manner that made them a part of the waste disposal problem. Therefore, the secondary material in the 3-sided bins was solid waste.

Personnel on-site indicated the bins contained material from tank bottom storage units. Laboratory analysis revealed that the tank bottoms contained lead, cadmium and other metals in excess of TCLP regulatory limits. Therefore, the bins contained hazardous waste.

The bins used to store the hazardous tank bottoms are not portable, and so cannot be considered

³ Water data provided by ASARCO and independent sampling by U.S. EPA indicate that such water consistently exhibits hazardous characteristics.

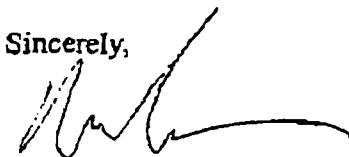
Mr. Jon Nickel - Page 5
March 7, 2000

"containers" [see ARM 17.54.201(20)]. The bins also are not "completely enclosed by a floor, walls and a roof to prevent exposure to the elements..." (see 40 CFR 264.1101), and so cannot be characterized as "containment buildings." The bins do not meet the definition of "surface impoundment" set forth at ARM 17.54.201(126) because they are not formed of primarily earthen materials. Finally, the bins are not "tanks" as defined in ARM 17.54.201(127) because they are not designed to, and do not in fact, "contain" an accumulation of hazardous waste. In fact, the three-sided concrete bins do not appear to be acceptable storage receptacles for hazardous waste under the Montana Hazardous Waste Act. Therefore, Asarco stored hazardous waste in other than an authorized manner, and in so doing has violated ARM 17.54.421(4)(a).

The department also concludes, on the basis of the foregoing analysis, that the bins were used to dewater the secondary materials and that ASARCO has engaged in treatment of hazardous waste in violation of the Montana Hazardous Waste Act. "Treatment" is defined at ARM 17.54.201(138) as "a method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or compositions of any hazardous waste so as to neutralize the waste or so as to render it nonhazardous, safer for transportation, amenable for recovery, amenable for storage, or reduced in volume." The inspectors observations of seepage at the toe of the limerock berms demonstrate that ASARCO was actively changing the physical nature of the secondary materials in the bins to make it amenable for recovery and to reduce its volume. Generators of hazardous waste may treat their own waste, provided such treatment occurs in proper containment vessels in less than 90 days (40 CFR 268.7(a)(5), incorporated by reference in ARM 17.54.150). As demonstrated above, the 3-sided bins do not constitute acceptable containment vessels. ASARCO's own records indicate wastes were held in the 3-sided bins for more than six (6) months. ASARCO does not hold a valid waste management permit. Therefore, ASARCO treated hazardous waste in violation of §75-10-406, MCA and ARM 17.54.105.

The department's Enforcement Division will be sending you a demand letter under separate cover in the next several days. If you have any questions, my direct line is (406) 444-1425.

Sincerely,



M. STEGER SMITH
Attorney Specialist
Department of Environmental Quality

cc: Mark Hall, DEQ AWMB
Kari Smith, DEQ ENFD
Susan Zazzali, U.S. EPA